Filed 10/1/02 Scout Island Investors v. City of Fresno CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

SCOUT ISLAND INVESTORS, LLC,

Plaintiff and Appellant,

v.

CITY OF FRESNO,

Defendant and Respondent.

F037480

(Super. Ct. No. 631292-0)

O P I N I O N

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison, Judge.

Holland & Hart; Motschiedler, Michaelides & Wishon and Russell K. Ryan for Plaintiff and Appellant.

Hilda Cantu Montoy, City Attorney; Best Best & Krieger, James B. Gilpin, Michelle Ouellette and Melissa W. Woo for Defendant and Respondent.

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Scout Island Investors, LLC, (Developer) petitioned for writ of mandate to compel City of Fresno (City) to issue building, sewer and water well permits for the development of single-family residences located near the San Joaquin River bottom. The superior court denied the petition. Developer now appeals, claiming (1) the issuance of the building permits was purely a ministerial act, rather than a discretionary act, for purposes of the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et

seq.), meaning the permit could not be conditioned upon completion of an environmental assessment; (2) City was estopped from requiring an environmental assessment; and (3) City was biased against Developer and not did fairly consider the applications for permits.

We affirm the judgment denying the petition for writ of mandate.

PROCEDURAL BACKGROUND

Developer filed its petition on April 30, 1999, and City responded with an answer. Developer moved for summary judgment or, alternatively, summary adjudication. The superior court denied this motion on April 13, 2000.

On June 14, 2000, the parties stipulated that the trial would be conducted through briefs, declarations and excerpts from the administrative record and depositions. The parties filed their papers and, on October 4, 2000, a writ hearing was held. The superior court ruled in favor of City, denying all of the relief sought by Developer.

On November 6, 2000, Developer filed a motion for modification or clarification of the superior court's ruling on the petition for writ of mandate. In that motion, Developer requested the ruling be modified "to require the City to have an objective third party conduct the environmental review." In support of this motion, Developer submitted excerpts from the administrative record prepared by City and excerpts from the depositions of nine individuals. On November 8, 2000, the superior court summarily denied the motion on the grounds that (1) Developer cited "no authority in support of its right to bring such a motion, following this court's ruling" and (2) the relief requested was beyond the scope of the issues raised in the original petition and the superior court's ruling on that petition.

The judgment was filed on December 6, 2000, and Developer filed a timely notice of appeal on January 29, 2001.

FACTS

Developer has owned approximately 61 acres of land located within City's boundaries near the San Joaquin River bottom to the east of the San Joaquin Country Club and west of the Fig Garden Golf Club. The land is north of the bluffs of the San Joaquin River and south of the river and an island formerly owned by the Boy Scouts of America. The land is zoned as "AE-5/UGM," which is an agricultural designation permitting one residence per five acres. The land is marketed by Developer under the name "Rivers Edge," but it is not a subdivision. Jon C. Thomason is a managing member of Developer.

In 1994, the land consisted of irregularly shaped lots. These lots were reconfigured pursuant to a lot line adjustment to form 12 lots approximately five acres in size and given the name Rivers Edge Development. The lot line adjustment was processed by City as a ministerial act that was not subject to the CEQA.

In 1995, Developer applied for 12 well water permits. Rayburn Beach, a planning manager with the City Development Department who was the designated CEQA specialist, worked on the environmental assessment initial study relating to the applications. The initial study found an environmental impact report was required before the permits could be issued. Developer disputed the findings and withdrew the environmental assessment application.

In a certificate of compliance recorded on July 21, 1995, City certified that the 12 lots were "in compliance with the provisions of the Subdivision Map Act and Fresno Municipal Code." Also on that date, Alvin Solis, director of the development department, sent Thomason a letter stating that, for existing parcels within the San Joaquin River bottom that met building and zoning code requirements, the Fresno City Council had authorized one building permit per parcel, should the necessary conditions be met. The letter also set forth conditions to be fulfilled before issuance of building permits for lots within the Rivers Edge Development. Those conditions related to

grading plans and permits, easements and improvements, water and sewer requirements, and payment of fees. One example of the conditions is that "[a]ll private waste water systems shall be approved by the City of Fresno and the County of Fresno Health Officer."

Lot 10. In the fall of 1996, Developer applied for a building permit for lot 10 (8005 N. Rivers Edge Road, Assessor's Parcel Number (APN) 500-020-18). On October 31, 1996, an attempt was made to submit a custom home plan check for lot 10; City rejected the submission on the grounds that conditions necessary to obtain a building permit had not been satisfied. On November 6, 1996, Solis sent a letter to Thomason stating which conditions set forth in the July 21, 1995, letter had not been satisfied. The unsatisfied conditions included the lack of (1) an approved grading plan and (2) formal proposals concerning easements and improvements and water and sewer requirements. The November 6, 1996, letter also advised Thomason of additional conditions concerning (1) resolution of a sovereign rights issue with the California State Lands Commission and (2) dedication and construction of public access to the "Master Multi-Purpose Trails Plan."

On November 15, 1996, City accepted Developer's application as complete and conducted a plan check. The plan check comments prepared by City staff were received by Developer on December 12, 1996. On January 24, 1997, Developer submitted a revised plan addressing those comments. When the review of Developer's revised plan was not completed by City within the time indicated by City, Developer's attorney sent a letter dated February 7, 1997, to the city manager complaining of (1) the delay in issuing the building permit and (2) a nonpublic session held by the city council at which an ordinance placing a moratorium on the issuance of building permits for parcels within the river bottom was discussed. The letter requested the minutes of the closed meeting be made public and threatened litigation if City did not issue the building permit for lot 10.

Meanwhile, an interim ordinance placing a temporary moratorium on the issuance of building permits in the San Joaquin River bottom was analyzed in a February 11, 1997, report by the development department to the city council. The report provided background on Rivers Edge Development and on recent flooding within the river bottom. The following summarizes the report:

> The construction plan check concerning the lot 10 building permit required the Fresno Metropolitan Flood Control District to approve of the flood protection measures for the new homes proposed for the Rivers Edge Development. The district concluded a 250-year flood event standard should be used for dwellings constructed in the San Joaquin River bottom. As a result, the district required the floor level of new dwellings in the floodplain be built at least one foot higher than the estimated 250-year floodplain. Developer agreed to comply with the district's requirements. Thus, the grading plan for Rivers Edge Development featured elevated house pads to provide flood protection. One weakness to this approach was that the 250-year floodplain had never been mapped.
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> One house pad in the Rivers Edge Development existed at the time of the January 2-3, 1997, flood event and an aerial photograph, taken before the flood's crest, showed the house pad as an island. The grading plan, based in part upon the district's computerized flood model, showed elevations for the house pads for the lots in the Rivers Edge Development would range from three to almost eight feet above the adjacent land. The staff concluded that when the conditions set forth in the plan check had been met, "a building permit must be issued, absent legislative authority otherwise." The staff recommended that an interim ordinance be adopted to allow time for reexamination of floodplain mapping, building standards and emergency planning in the river bottom.

On February 7, 1997, the three highest officials of the Development department--Solis, Nick Yovino and Mark Williamson--and two members of the Fresno City Attorney's office inspected the Rivers Edge Development site. Developer complained the only purpose of the visit was to seek any conceivable justification for delaying or stopping the project.

The condition on the issuance of the building permit concerning the potential State Lands Commission claim was resolved by a February 19, 1997, letter from the

commission to Solis stating the commission had no comment to offer regarding the issuance of a building permit for lot 10. The condition concerning the dedication of access to public trails was withdrawn after considerable effort was exerted by Developer's counsel to demonstrate the requirement was illegal.

In a March 26, 1997, memorandum to the city manager, Solis stated Developer had complied with the plan check correction comments, the development department was in a position to issue the building permit, and the development department was required to issue the permit under applicable law. Solis's view of the mandatory nature of City's obligation to issue permits was confirmed in his May 16, 1997, letter to the Fresno County Public Works Department and in his deposition testimony.

Finally, on March 27, 1997, City issued a building permit for lot 10 without requiring an environmental assessment. A home estimated by Thomason to be worth $900,000 was built on that lot and remains occupied.

Lot 6. In June 1998, City issued a final building permit for lot 6 (8085 N. Rivers Edge Road, APN 500-020-14). No environmental assessment was required. At the time the building permit was issued, Solis held the belief that issuance of the permit was ministerial and was required under applicable law. A home was built on lot 6 and also remains occupied.

Lot 1. In the summer and fall of 1998, Developer attempted to obtain a building permit for lot 1 (8185 N. Rivers Edge Road, APN 500-020-21). In pursuing the permit, Developer contended there were no differences or changes in the property from the time the building permits for lots 10 and 6 were issued until the application for the building permit for lot 1. The conditions imposed by City on the issuance of the permit included gaining Solis's approval; meeting fire prevention, grading, septic system and well/water supply requirements; resolving county allegations of a potential Subdivision Map Act

(SMA) (Gov. Code, § 66410 et seq.) violation;[1] and the setting forth of access easements for utility, drainage and the like. The City also required an environmental assessment.

Solis recommended an environmental assessment in part because he believed Thomason had provided inconsistent and contradictory information to City and other agencies. City's position that an environmental review of the Rivers Edge Development project was required was explained in a letter from Solis to Thomason dated November 20, 1998. The letter states that (1) a project the size of Rivers Edge Development was normally subject to environmental assessment, (2) an environmental assessment would have been completed three years earlier when the applications for 12 well drilling permits were filed, but those applications had been withdrawn, (3) the proposed use of septic tanks complicated the water supply concerns because "[s]eptic tanks will compete with space necessary to accommodate the drawdown of several wells on a site in which utilities must be located above the 100-year flood zone," and (4) the project was unique and the City's responsibilities under CEQA could not be satisfied with a piecemeal approach.

Thomason believed the request by City for a well drilling permit from the City Department of Public Utilities was irrelevant because he intended to supply water to lot 1 from the well serving lot 10. He intended to provide water to lot 1 for domestic use and fire service by installing a pipeline from a well previously drilled in the county. With respect to the septic tank for lot 1, his plan was to provide the same design as previously approved and used on lots 10 and 6; City had already been supplied with a sewage feasibility study that applied to all lots within Rivers Edge Development.

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[1] These allegations were resolved in another action; on October 20, 1998, the county was ordered to expunge its "Notice of Subdivision Map Act Violation" on the grounds its assertion of the violation was barred by laches and estoppel.

A 12-page letter dated January 29, 1999, from Developer's attorney to Solis (1) set forth Developer's response to the November 20, 1998, letter and a December 10, 1998, letter from Solis regarding environmental review of the Rivers Edge Development; and (2) demanded that the environmental review requirement be withdrawn and the necessary permits be issued immediately. The January 29, 1999, letter contained, among other things, assertions that Rivers Edge Development was not a "project" for purposes of CEQA, but was several parcels for which the issuance of building permits were ministerial and not subject to CEQA.

In response to the letter from counsel, Solis sent Thomason a letter dated March 18, 1999, that reiterated the position that "[a]n environmental assessment is required under the circumstances in connection with or prior to the issuance of any further permits as to new developments" at Rivers Edge Development. The parties were unable to resolve their differences, and Developer filed its petition for writ of mandate on April 30, 1999.

DISCUSSION

I. Mootness

City claims Developer's appeal is moot because Developer submitted fees and is proceeding with the preparation of an environmental assessment of the development project.[2] City's reply brief correctly states the rule of law that an appeal is moot if it is impossible for an appellate court to grant an appellant any effectual relief. (*Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541; *In re Joel H.* (1993) 19 Cal.App.4th 1185, 1193.)

[2] City's motion for judicial notice of public records relating to Developer's submission of an application and fees for an environmental assessment of construction of nine homes on nine lots is granted.

City asserts that, after filing its notice of appeal, Developer took steps to complete the environmental assessment report imposed by City by submitting the required fee to City. City argues that because this step by the Developer "directly contradicts its position on appeal, the issue presented herein is moot." However, under the rule of law previously stated, taking positions that are merely contradictory is not enough to render an appeal moot. City must show this court has *no possibility of granting effectual relief*.

This showing has not been made, or even attempted. City offers no explanation of why an order by this court directing the issuance of the requested permits would not be effectual relief for Developer. Indeed, such an order would be highly effectual from Developer's perspective because it would not need to proceed with any environmental assessment, prepare any environmental impact report, or satisfy any further conditions that might be imposed on the issuance of the requested permits. Accordingly, we conclude the controversy regarding the issuance of building permits to Developer is not moot.

II. Standard of Review

"In a mandate proceeding to review an agency's decision for compliance with CEQA, the scope and standard of our review are the same as the trial court's, and the lower court's findings are not binding on us. [Citation.] We review the administrative record to determine whether the agency prejudicially abused its discretion. [Citation.] 'Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.' (Pub. Resources Code, § 21168.5;[3] [citations].) 'Substantial evidence' is defined in the CEQA

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3 Public Resources Code section 21168.5 provides in full, "In any action or proceeding, other than an action or proceeding under Section 21168, to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with this division, the inquiry shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the

Guidelines as 'enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made ... is to be determined by examining the whole record before the lead agency. Argument, speculation, unsubstantiated opinion or narrative [or] evidence which is clearly erroneous or inaccurate ... does not constitute substantial evidence.' ([Cal. Code Regs., tit. 14,] § 15384, subd. (a).) The agency is the finder of fact and we must indulge all reasonable inferences from the evidence that would support the agency's determinations and resolve all conflicts in the evidence in favor of the agency's decision. [Citation.]" (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 116-117, fn. omitted.)

III. Scope of Project for Purposes of CEQA

For purposes of CEQA, what is the scope of the relevant "project" here? Developer contends each single-family residence is a separate project. City asserts that Developer's project encompasses the development of 11 single-family residences on the 12 lots comprising the 61-acre tract, i.e., the entire Rivers Edge Development.

When the facts presented by the record are not in dispute, the issue of whether an act constitutes a "project" for purposes of CEQA presents a question of law. (*Kaufman & Broad-South Bay, Inc. v. Morgan Hill Unified School Dist.* (1992) 9 Cal.App.4th 464, 470.)

CEQA defines a "project" extremely broadly as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: [¶] … [¶] (c) [a]n activity that involves the issuance to a person of a lease, permit, license, certificate,

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agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence."

or other entitlement for use by one or more public agencies." (Pub. Resources Code, § 21065; see Cal. Code Regs., tit. 14, § 15378, subd. (a)(3) [a project is "the whole of an action"]; all further citations to title 14, section 15000 et seq. of the California Code of Regulations will be referred to as Guidelines.)

Furthermore, courts give "project" a broad interpretation in order to maximize protection of the environment. (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1189.) The California Supreme Court has stated that CEQA is "to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.) From this principle, "it is clear that the requirements of CEQA 'cannot be avoided by chopping up proposed projects into bite-sized pieces' which, when taken individually, may have no significant adverse effect on the environment (*Plan for Arcadia, Inc. v. City Council of Arcadia* (1974) 42 Cal.App.3d 712, 726) …." (*Lake County Energy Council v. County of Lake* (1977) 70 Cal.App.3d 851, 854.)

Consistent with this approach of not breaking an activity down into bite-sized pieces, Guidelines section 15378, subdivision (c) states, "[t]he term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term 'project' does not mean each separate governmental approval." Thus, in *Plan for Arcadia, Inc. v. City Council of Arcadia* (1974) 42 Cal.App.3d 712, 726, the shopping center construction, parking lot construction and widening of an adjacent portion of the street were regarded as a single project for purposes of CEQA.

In this case we are convinced the undisputed evidence shows that Rivers Edge Development is an "activity [that] may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (Pub. Resources Code, § 21065.) Therefore, we conclude Rivers Edge Development is a

single project within the purview of CEQA. The issuance of a building permit cannot be separated from the issuance of the other permits for purposes of determining the scope of the project. Nor can each lot be regarded as a separate project.

The factors most important to this conclusion concern the interrelationship of the lots. For example, the construction of each residence is clearly interconnected with the others by shared community improvements such as roads and lighting and by the unique river bottom location in which the residences are to be built. Also, the interrelationship is shown by Developer's claim that the sewage feasibility study provided City applies to all lots within Rivers Edge Development.

Additional factors that support the conclusion Rivers Edge Development is a single project are (1) the 61 acres were under common ownership; (2) the lot line adjustment encompassed all of the lots within the development; (3) Developer's prayer for relief, which requests, among other things, an injunction prohibiting "the City from requiring an environmental review of the Subject Property before issuing building, water well and sewer permits"; (4) the intent of the Developer to complete construction of residences on the remaining lots;[4] and (5) the lots being marketed under one name, i.e., "River's Edge."

[4] The statutory basis for considering common ownership and a single developer as relevant to the scope of a project is the language in Public Resources Code section 21065, subdivision (c), that refers to an "activity that involves the issuance *to a person* of a … permit …." (Italics added.) The statute refers to a single person and not to one or more persons. We need not reach the question discussed hypothetically at oral argument of whether a single project would exist if each lot was owned by a different person.

IV. Discretionary versus Purely Ministerial Act

City contends an environmental assessment of the Rivers Edge Development is justified because (1) the development is located in a unique and sensitive location, (2) City had reasonable concerns Developer was attempting to avoid environmental review, and (3) the requested permits include discretionary elements. Developer contends issuance of the requested permits requires only a ministerial act by the City and, thus, is not subject to CEQA.

When the approval of the building permit is purely ministerial and not discretionary, an environmental assessment under CEQA is not required because that assessment would be useless to the officials carrying out the ministerial task. (See *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 117.)

"Ordinarily issuance of a building permit for a project meeting the criteria of the applicable zoning ordinance and Uniform Building Code is a ministerial project to which CEQA does not apply." (*Prentiss v. City of South Pasadena* (1993) 15 Cal.App.4th 85, 89.) However, if "any discretionary provision [is] contained in the local ordinance or other law establishing the requirements for the permit," then CEQA applies. (Guidelines, § 15268, subd. (b)(1).)[5] For regulatory purposes, a discretionary provision "requires the

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[5] Section 15268 of the Guidelines provides in pertinent part:

"(a) Ministerial projects are exempt from the requirements of CEQA. The determination of what is "ministerial" can most appropriately be made by the particular public agency involved based upon its analysis of its own laws, and each public agency should make such determination either as a part of its implementing regulations or on a case-by-case basis.

"(b) In the absence of any discretionary provision contained in the local ordinance or other law establishing the requirements for the permit, license, or other entitlement for use, the following actions shall be presumed to be ministerial:

"(1) Issuance of building permits.

exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations." (Guidelines, § 15357.)

An agency's review of a project is discretionary if the agency is allowed "to shape the project in any way which could respond to any of the concerns which might be identified in an environmental impact report." (*Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 267.) An agency is foreclosed from influencing the shape of the project "[o]nly when a private party can *legally compel* approval without any changes in the design of its project which might alleviate adverse environmental consequences." (*Ibid*.) In contrast, if City has enough authority to deny or even modify the proposed project based on environmental consequences, the permit process is discretionary. (*Id*. at p. 272.)

Fresno's municipal ordinance concerning the issuance of building permits does not directly state whether the city official exercises judgment in issuing a building permit. Rather, Fresno Municipal Code section 13-100.106.4.1,[6] requires the official to be

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"……..

"(c) Each public agency should, in its implementing regulations or ordinances, provide an identification or itemization of its projects and actions which are deemed ministerial under the applicable laws and ordinances.

"(d) Where a project involves an approval that contains elements of both a ministerial action and a discretionary action, the project will be deemed to be discretionary and will be subject to the requirements of CEQA."

6 Fresno Municipal Code section 13-100.106.4.1 provides: "The application, plans, and specifications filed by an applicant for a permit shall be reviewed by the Building Official. Such plans may be reviewed by other departments of the city to check compliance with the laws and ordinances under their jurisdiction. If the Building Official

"satisfied that the work described in an application for permit and the plans filed therewith conform to the requirements of this code and other pertinent laws and ordinances …." Accordingly, we must look to the requirements of the Fresno Municipal Code and other pertinent laws and ordinances to determine if any discretionary provisions requiring the exercise of judgment or deliberation are applicable in this case.[7]

City contends that the ordinances and regulations that contain discretionary provisions and are applicable to this case are "AE-5 zoning regulations; UGM zoning regulations; water regulations, sewage and water disposal ordinances, and well ordinances; and the Uniform Fire Code." The decision to require an environmental assessment was based on advice given to Solis by other department heads and other agencies about concerns they had about the building out of the Rivers Edge Development. City contends the "concerns ranged from potential impacts related to fire flow access and sewer, water, and flooding issues."

In support of its determination that the requested approvals were discretionary, the superior court stated:

> "In Exhibit 'G' attached to its petition, [Developer] acknowledges a 1995 letter of the City Director of Public Utilities confirming the City's decision to 'allow' private wells to serve the subject property, pursuant to [Fresno Municipal Code] Sections 9-602 and 9-603. In Exhibit 'H' to that petition, [Developer] acknowledges the 1995 letter of the City Director of Public Utilities confirming the City's decision to 'defer' connection of the subject property to the public sewer system, pursuant to FMC 9-502. In

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is satisfied that the work described in an application for permit and the plans filed therewith conform to the requirements of this code and other pertinent laws and ordinances, and that the permit fee, and all applicable fees, deposits and charges set forth in Section 13-100-107 have been paid, the Building Official shall issue a permit therefore [*sic*] to the applicant.…"

[7] City's motion for judicial notice of certain provisions of the Fresno Municipal Code is granted.

> that same letter, the Director notes that this deferral is subject to approval from the County Health Director. Further, [Developer's] own 1998 letter requesting that the City Fire Marshall 'defer' the requirement to build-out the fire suppression system for the subject property acknowledges the City's authority to modify the fire suppression system, and confirms the City's earlier exercise of discretion to defer that modification. (A.R. 6560) Finally, the 1998 letter from City Development Director Solis notes that City Staff had previously adopted a policy of 'flexibility' on how [Developer] provided potable and fire suppression water to the subject property. (A.R. 6671 at 6674)
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> "All of the foregoing belie [Developer's] contention that the City has always acted ministerially with respect to the issuance of building permits and other approvals on the subject property. Moreover, the decision of the Director of Public Works to defer connection of the subject property to City water and sewer systems, and the decisions of the City Fire Marshall in both approving individual fire suppression systems on two or three parcels and deferring a complete system on the subject property, demonstrate the actual exercise of personal, subjective judgment. Those decisions to approve or disapprove, to defer and to be flexible, are consistent with the discretion described in CEQA Guideline 15357."

The foregoing analysis of the superior court is supported by the discretionary language used in the municipal code. Subdivisions (a), (b) and (c) of Fresno Municipal Code section 9-602 all state the public works director "*may* issue a permit for the drilling" (*italics added*) if the specified regulatory requirements are met. The term "may" obviously is discretionary.

In response to Developer's argument that the issuance of building permits is ministerial because Solis testified the issuance of building permits was a ministerial act and City has never required an environmental assessment for the issuance of a building permit for a single-family residence, we note that a city's characterization of its building permit process as ministerial is not binding on the courts. (See *Friends of Westwood, Inc. v. City of Los Angeles*, *supra*, 191 Cal.App.3d 259.) In reviewing a case, a court is responsible for determining the legal issue of whether CEQA applies.

Lastly, we note that Developer's position regarding the supply of water to lot 1, if accepted, would have the practical effect of precluding any City review of the particulars

(such as amount and quality) concerning the water provided to lot 1. In essence, all issues concerning water supply would be resolved by the owner's representation that the water will be supplied from a well located in the county. Such a result is unwarranted in the face of the judgment to be exercised regarding health and fire protection considerations, which could lead to City's requiring modifications of Developer's proposed water service.

In light of the foregoing, the issuance of the requested permits concerning lot 1 and the other lots requires the use of judgment on the part of City officials and, thus, encompasses the exercise of discretion by City.

V. Significant Environmental Effect

If a project is not exempt from CEQA and there is a possibility that the project may have a significant environmental effect, the agency must conduct an initial study. (*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 185.) In this case, an initial study must be conducted under CEQA because (1) the project is not exempt as it requires discretionary approval, and (2) substantial evidence supports the determination that the project may have a significant environmental effect.

The superior court observed that "[a]n official of the Fresno County Health Service Agency expressed the opinion that construction of those residences had the potential to impact public health, given the specific geologic conditions of the river bottom where the project was proposed. He concluded, based on those geological conditions, that allowing private septic systems risked pollution of both the river and existing private wells in the area." We concur in the determination of the superior court that substantial evidence supports City's conclusion that the construction of single-family residences on all the lots in Rivers Edge Development may have a significant effect on the environment.

VI. Equitable Estoppel

Developer claims City should be equitably estopped here from imposing CEQA requirements, but it has failed to cite any cases in which the doctrine of equitable estoppel is used to require a local government to issue a building permit without regard for the requirements of CEQA. The well-established and rigidly applied building permit rule, which served as the basis for the superior court's determination, compels the rejection of Developer's equitable estoppel argument. (See *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 552.)

"Courts have yet to extend the vested rights or estoppel theory to instances where a developer lacks a building permit or the functional equivalent, regardless of the property owner's detrimental reliance on local government actions and regardless of how many other land use and other preliminary approvals have been granted. To the contrary, it has been stated that '"[w]here no such permit has been issued, it is difficult to conceive of any basis for such estoppel." [Citations.]' [Fn. and citation omitted.] California courts apply this rule most strictly, although it has been criticized as 'giv[ing] a green light to administrative vacillation virtually up to the moment the builder starts pouring concrete.' [Citation.]" (*Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 321-322.)

Developer does not directly address why this court should, without precedent, extend the equitable estoppel theory to the issuance of the requested building permits. Nor does Developer explicitly address the building permit rule and how Developer contends that rule was misapplied by the superior court. Developer's claim of equitable estoppel fails.

VII. Developer's Posttrial Claim of City's Bias

Developer contends the administrative record shows City officials were biased against it and thus establishes City prejudicially abused its discretion. (Cf. *Western States Petroleum Assn. V. Superior Court* (1995) 9 Cal.4th 559; *Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74 [extra-record evidence of agency misconduct not

admissible].) Developer first raised this issue in a motion for modification or clarification of the superior court's ruling denying the petition for writ of mandate. The superior court summarily denied the motion on the grounds that (1) Developer cited "no authority in support of its right to bring such a motion, following this court's ruling" and (2) the relief requested was beyond the scope of the issues raised in the original petition and the superior court's ruling on that petition.

On appeal, Developer overlooks the procedural impediments to pursuing this claim and presents arguments only as to the merits of its claim of bias and prejudice. Absent any explanation of how Developer's claim of bias and prejudice could be introduced through a posttrial motion, we fail to see a viable argument emerging on appeal. We find no error in the superior court's ruling on Developer's motion for modification or clarification.

DISPOSITION

The judgment is affirmed. Each party is responsible for its own costs on appeal.

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VARTABEDIAN, Acting P. J.

WE CONCUR:

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HARRIS, J.

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WISEMAN, J.